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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 424

FEDERAL SECURITY ADMINISTRATOR,
Petitioner,

vs.

THE QUAKER OATS COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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PRELIMINARY STATEMENT.

The petitioner* asks this Court to review the decision of the Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals (R. 679-689) is reported in 129 Fed. (2nd) 76.

The essential facts may be stated in a short paragraph. For over ten years respondent, The Quaker Oats Company, has been marketing an admittedly highly nutritious product known as "QUAKER FARINA Wheat Cereal Enriched With VITAMIN D" (R. 218). The Administrator has specifically found or admitted that Vitamin D is very beneficial, particularly to infants and children who are large consumers of respondent's product, that respondent's prod-

*Respondent will in this brief follow the procedure adopted by petitioner in his petition and refer to him as "Administrator." Italics throughout this brief are supplied unless otherwise noted.

uct is truthfully labelled and that Vitamin D does not adulterate or dilute the product (R. 617, 626, 683). The Administrator promulgated two food standards; one for farina in which Vitamin D is not permitted to be added, the other for a theretofore unknown product which the Administrator called "Enriched Farina" in which he permitted the addition of Vitamin D but only upon condition that Vitamin B_1, riboflavin, nicotinic acid and iron be first added (R. 627, 637-8). As the Court below found from the record, there is no relationship between Vitamin D and the four above-named substances (R. 687).

The Administrator has urged in his petition four reasons for the granting of the writ of certiorari. It is respondent's view that none of these reasons is sufficient to justify this Court in granting the writ. Why these reasons are insufficient and why the decision of the Court of Appeals was clearly correct will be hereinafter pointed out in the Argument. For convenience, the reasons urged by the Administrator will be discussed in the order they are presented in his petition.

Under the heading "Questions Presented" the Administrator has in his petition omitted what we consider the most fundamental and important question presented in this case (Pet. 2). That question is whether or not Section 401 of the Federal Food, Drug and Cosmetic Act empowers the Administrator to bar from the market a wholesome and nutritious food which is truthfully and correctly labelled, and which is neither adulterated nor diluted.

SUMMARY OF THE ARGUMENT.

We have conformed our argument to that of the Administrator and take up his points urging that this Court review the decision of the Court below as follows:

1. The Administrator's first point is that this is the first case before this Court under the Federal Food, Drug and Cosmetic Act of 1938 and that "the conclusions of the Court below jeopardize *the food standards program*".

2. The Administrator contends that his finding that indiscriminate enrichment would tend to confuse and mislead consumers is clearly supported by substantial evidence, the alleged evidence being opinions dealing *"with probable future effects of present trends"* (Pet. p. 15).

3. The Administrator contends that "the *ill-advised skeptic* will pay as much for plain farina as for the superior product, enriched farina (cf R. 413); the *credulous* can be persuaded to pay as much for one vitamin as for four (cf R. 177)" and that action to protect the *ill-advised skeptic* and *the credulous* will promote honesty and fair dealing in the interest of *all* consumers (Pet. 16).

4. The Administrator contends that there was evidence in the record upon which to base the exclusion of Vitamin D as an optional ingredient in farina.

ARGUMENT.

1. In contending that the conclusions of the Circuit Court of Appeals for the Seventh Circuit "jeopardize *the food standards program*" (Pet. 12), the Administrator attempts for the first time to create an issue which cannot lawfully exist. We are concerned with a statute, a simple and plainly worded statute which the Administrator would ignore for his *food standards program*, or, as he sometimes says *"the enrichment program"* (Pet. 15).

Section 401 of the Federal Food, Drug and Cosmetic Act of 1938 (21 U. S. C. A. 341) prescribes and limits the power of the Administrator to establish definitions and standards of identity for foods. It reads:

> "Whenever in the judgment of the Administrator *such action will promote honesty and fair dealing in the interest of consumers*, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a *reasonable definition and standard of identity*, a reasonable standard of quality, and/or reasonable standards of fill of container: Provided, That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocadoes, cantaloupes, citrus fruits, and melons. In prescribing any standard of fill of container, the Administrator shall give due consideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packing and protective material. In the prescribing of any standard of quality for any canned fruit or canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. In prescribing a definition and standard of

identity for any food or class of *food in which optional ingredients are permitted*, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, *designate the optional ingredients which shall be named on the label.* Any definition and standard of identity prescribed by the Administrator for avocadoes, cantaloupes, citrus fruits or melons shall relate only to maturity and to the effects of freezing".

The Administrator urges in effect (Pet. 12-13) that he has authority under the statute to bar the sale of a food (and thus make such sale a criminal offense), notwithstanding that (1) it is improved nutritionally; (2) it is wholesome and contains no harmful or deleterious ingredients; (3) it is not adulterated; (4) it is not diluted; and (5) it is correctly and truthfully labelled.

But Section 401 of the Federal Food, Drug and Cosmetic Act was never designed to destroy honestly conducted business in healthful foods which are truthfully and correctly labelled and neither adulterated nor diluted, and by destroying such business deprive the public of products which they need and want. Certainly such a construction for which the Administrator now contends is in no way in conformity with the purposes of the statute, which in the language of this Court, as applied to the earlier Food and Drug Act of 1906, are "to secure the purity of foods" and "to inform purchasers of what they are buying" (*U. S.* v. *Antikamnia Chemical Co.*, 231 U. S. 654, 665).

No important new question of Federal law is presented in this case. Section 401 of the Act, which petitioner characterizes as "the *important food standardization provisions*" of the statute, is patterned closely after a similar provision in the earlier Food and Drug Act of 1906 (21 U. S. C. A., Section 10 as amended July 8, 1930). In the amendment of July 8th, 1930, to Section 10 of the earlier

act, a provision empowering the Secretary of Agriculture to promulgate certain standards for canned foods was added to the statute. That section used language *identical* in its pertinent parts to the language in Section 401. It empowered the Secretary of Agriculture to promulgate *reasonable* standards of quality, etc., for the canned foods there covered, and he was limited in his power to promulgate such standards to such as would in his judgment "*promote honesty and fair dealing in the interest of the consumer.*" So since 1930 and until it was replaced by the 1938 Food, Drug and Cosmetic Act, the old 1906 Food and Drug Act contained food standardization provisions almost identical with Section 401 here involved.

The parallel provision to Section 401, appearing in the earlier statute, has been judicially interpreted. That section was involved in *Nolan* v. *Morgan*, 69 Fed. (2nd) 471 (C. C. A. 7), and in that case the Court of Appeals for the Seventh Circuit approved of the District Court's decision interpreting the words in the statute "promote honesty and fair dealing in the interest of the consumer" as meaning what this Court in *U. S.* v. *Antikamnia Chemical Co.*, 231 U. S. 654, said the earlier statute as a whole meant, namely (P. 665):

> "The purpose of the Act is to secure the purity of foods and drugs, and to inform purchasers of what they are buying."

The foregoing language is equally applicable to the present Food, Drug & Cosmetic Act. Therefore, no new question of scope or judicial interpretation is presented which would justify this Court's review of the present proceeding.

At page 13 of his petition, the Administrator further states the fallacy of his position when he says:

> "In most of the standards already promulgated, the Administrator has excluded or limited the quantity of one or more ingredients on the ground that their use

> would not promote honesty and fair dealing in the interest of consumers, although there was no evidence that the proposed ingredients were deleterious or that the proponents of these ingredients intended to misrepresent their products."

Correctly paraphrased, Section 401 quoted above says that *reasonable* definitions and standards of identity may be established by the Administrator when *such action* will promote honesty and fair dealing. It further says that he shall, to promote honesty and fair dealing, *designate* the optional ingredients to be named on the label. It is absurd to contend that salt, sugar, cream, chocolate, and other possible ingredients of a product must individually and *per se* promote honesty and fair dealing. On the other hand, Congress recognized that the nature of some ingredients might be such that honesty and fair dealing would be promoted by naming them on the label. The promotion of honesty and fair dealing relates to the propriety of taking action to establish a standard and to whether some ingredients should be named on the label; the test of the standard and of the ingredients of the standard is reasonableness. All that the Administrator had to do to promulgate a *reasonable* farina standard in accord with the purpose of the Act (purity of foods and inform purchasers of what they are buying) was to require that when farina is improved by the addition of Vitamin D, Vitamin D be named on the label.

2. The Administrator's second reason for urging the granting of the writ is that his finding that indiscriminate enrichment would tend to confuse and mislead consumers is clearly supported by substantial evidence. This is not a sufficient reason for granting the writ. After careful examination of the record, the Court of Appeals below found with respect to the possibilities of confusion that (Rec. 686):

> "There was no evidence in support of such possibilities and they are entirely speculative and conjectural."

A careful reading of the petition and of the record on this subject shows that the witnesses who speculated did so on the basis that confusion would result if there were a plurality of products on the market under the name "Enriched Farina," each, however, being enriched with different vitamin or mineral additions. But respondent does not market a product under the name "Enriched Farina" nor has it represented its product as "Enriched Farina." Respondent has for ten years been selling farina, not "Enriched Farina." Respondent has used the adjective "enriched" only as clearly and truthfully modifying the term "Vitamin D" in its designation "QUAKER FARINA Wheat Cereal Enriched With VITAMIN D." Thus it is apparent that respondent's offense under the Administrator's two standards would be in improving farina by the addition of a beneficial ingredient. It is the farina standard, not the enriched farina standard, that respondent violates,—violates by improving the product.

The realities of the situation must be considered. The weakness of the Administrator's argument with respect to indiscriminate enrichment causing confusion is clearly demonstrated by his admission that the sale of respondent's product has caused no confusion and has misled no one, not even petitioner's "ill-advised skeptic" or "the credulous" (Pet. 18). Yet the effect of the Administrator's two standards is to deprive the consumer of the opportunity of purchasing what he wants—respondent's product, improved nutritionally, an aid in overcoming a widespread Vitamin D deficiency, truthfully labelled and causing confusion to no one.

3. In presenting his third point the Administrator argues "*the ill-advised skeptic* will pay as much for plain farina as for the superior product, enriched farina (cf R. 413); *the credulous* can be persuaded to pay as much for one vitamin as for four (cf R. 177)" (Pet. 16). His regulations then are evidently only in the interest of "*the ill-advised*

skeptic" and "*the credulous.*" In other words, the regulations are not in the interest of reasonable, intelligent, average people constituting the vast majority of consumers.

On the subject of confusion the Court below had this to say (Rec. 686-7):

> "Furthermore, we should think that a product manufactured in accordance with the regulations in suit would tend to increase rather than retard confusion. This is especially true as to enriched farina. No such product has been sold heretofore under that designation. The manufacturer will be required only to label it "enriched farina," unless the option to add Vitamin D is exercised, in which case such addition must be stated. How the ordinary consumer will be informed so as to avoid confusion as to what is meant by enriched farina, its contents, or the benefits to be expected from its use, is a mystery which we are not able to fathom. How the contention that confusion is likely to result from a product, such as petitioner's, which truthfully informs the consumer as to what he is buying, can be reconciled with the contention that a product sold as enriched farina, without any further description, will lessen or avoid confusion, is beyond our comprehension."

4. The Administrator's fourth reason for urging the granting of the writ is that there is other evidence in the record supporting the exclusion of Vitamin D from the definition of farina (Pet. 18-19). This "other evidence" carries no weight whatsoever in view of the Administrator's own findings, based upon the *entire* evidence, of the existing widespread Vitamin D deficiency and the extensive use of respondent's product by infants and children, where that deficiency primarily exists (R. 617, 626). More importantly, it does not lie with the Administrator to argue such evidence in the face of his own recognition of Vitamin D as an optional ingredient in the standard for "enriched farina."

The record is clear and the Court below so found in stating that (Rec. 687):

> "• • • no claim is made of any relationship or co-action between Vitamin D and the other ingredients required in enriched farina."

CONCLUSION.

The effect of the Administrator's standards is to bar from the market and deprive the consumer of the opportunity of buying respondent's product, which in the language of the Court of Appeals is "admittedly a wholesome and healthful product", and which "has been sold to millions of consumers, without deception, fraud, or misrepresentation of any kind or character" (R. 683).

The Court below found that the Administrator, in so acting, exceeded his statutory authority and in substance said that regulations which prohibit the improvement of a product and deprive the public of an improved product which is honestly labelled, and which is neither adulterated nor diluted, do not promote honesty and fair dealing in the interest of consumers, and that such regulations are furthermore unreasonable and arbitrary and thus beyond the Administrator's statutory authority. Such being the case the Court of Appeals was clearly right in holding the farina and enriched farina standards invalid. There is no occasion for this Court to review that decision by the granting of the writ of certiorari. The petition, therefore, should be denied.

Respectfully submitted,

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